(19)

MAY 10 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 990

CLARENCE CROMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WITH BRIEF IN SUPPORT THEREOF.

LEVI H. DAVID,
Bond Building,
Washington, D. C.
M. EDWARD BUCKLEY, JR.,
406 5th Street, N. W.,
Washington, D. C.
Attorneys for Petitioner.

INDEX.

Table of Contents.

Cases Cited.

STATUTES CITED

TREASURY DECISIONS

CONSTITUTION OF U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

CLARENCE CROMER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Clarence Cromer, respectfully submits this his petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia, affirming (Rec. 106) conviction of petitioner on an indictment, containing twelve counts, charging violation of the Harrison Anti-Narcotic Act and the Narcotic Drugs Import and Export Act (commonly known as the Jones-Miller Act), in the District Court of the United States for the District of Columbia.

Opinion of Court Below.

The opinion of the Court below, announced March 20, 1944, not yet printed in official volume, is contained on pages 104-106 of the record.

The petition of petitioner for a rehearing is set forth in the record at pages 108-113 and was denied by order of the Court below on April 7, 1944, and is contained in the record at page 114.

Jurisdiction of this Court.

The jurisdiction of this Court is invoked in this case under sec. 240 (a) of the Judicial Code as amended by the act of February 13, 1925, chap. 229, sec. 1, 43 Stat. 938, Title 28, U. S. C. A. sec. 347 (a).

Questions Presented.

1. Whether a material and fatal variance exists between the allegations of the counts of the indictment and the proof of the government, in a prosecution under the Harrison Anti-Narcotic Act (26 U. S. C. A. secs. 2553 (a) and 2554 (a)) and the Narcotic Drugs Import and Export Act (commonly known as the Jones-Miller Act, 21 U. S. C. A. sec. 174), in respect to quantity alleged and misdescription of substance, there being a conflict of decisions with reference thereto, namely, the decision of the United States Court of Appeals for the District of Columbia in the instant case conflicts with the case of *Guilbeau* v. *United States*, 288 Fed. 731 (CCA, 5, 1923), holding that such variance is fatal to a conviction, which latter case is in conflict with *MacIntosh* v. *United States*, 1 F. (2) 427 (CCA 7, 1923), and the decision of the Court of Appeals in the instant case is also in conflict with *Coleman* v. *United States*, 26 Fed. (2), 870 (CCA, 8, 1928) which is in conflict with *MacIntosh* v. *United States*, *supra*.

2. Whether counts 1, 3, 5, 7 and 9 of the indictment, or any of said counts, set forth an offense under the Harrison Anti-Narcotic Act, *supra*, in view of the misdescription in each of said counts in relation to the allegation that a sale of heroin hydrochloride was made by petitioner to one Rufus Ford "not in pursuance of a written order from the said Rufus Ford on a form issued in blank for that purpose *by the Commissioner of Internal Revenue*" instead of an allegation that such sale was made not in pursuance of a written order from said Rufus Ford on a form prescribed *by the Commissioner of Narcotics* and issued in blank for that purpose *by a Collector of Internal Revenue*, as required by law. (This point is material, *Fleisher et al.* v. *United States*, 302 U. S. 218 (1937).

3. Whether petitioner's motion for a mistrial should have been granted (Rec. 46, 47, 54, 61, 70, 52, 63, 67) in view of the misconduct (Rec. 46, 47) of two government witnesses who violated the order of court not to discuss the facts involved in the instant case with other witnesses, whilst all witnesses were under the usual rule of separation (Rec. 28, 46).

Petitioner respectfully submits that it is imperative that a uniform rule of practice and procedure for all federal District Courts be laid down by this Court as a guide, especially when the same witnesses are constantly recalled to testify in support of different counts of an indictment which was the situation in the instant case (Rec. 30-35; 45, 47; 54-55; 61-63; 71-76). Narcotic Agent Fields was recalled five times (Rec. 35-38; 43-45; 52-54; 63-64; 67-70).

4. Whether the use of evidence by the prosecution, over objection and exception by petitioner (Rec. 67, 69, 71, 72, 73, 78, 79, 80-1), obtained by illegal search and seizure of petitioner's home and premises, without a warrant of arrest and without search warrant, was in violation of the Fourth and Fifth Amendments to the Federal Constitution.

5. Whether the accumulated harsh sentences (*U. S.* v. *Daugherty,* 269 U. S. 360, 364) on each and all of the twelve counts of the indictment, aggregating fifteen years, are void for uncertainty and ambiguity, and illegal, and, therefore, in violation of the due process clause of the Fifth Amendment to the Federal Constitution; and whether the same inflicts cruel and unusual punishment upon petitioner, by the method of the imposition of said sentences, in violation of the Eighth Amendment to said Federal Constitution (*Weems* v. *U. S.* 217 U. S. 349 (1910)).

Statutes Involved.

Title 26 U. S. C. sec. 2554 (a) (part of the Harrison Anti-Narcotic Act relating to counts 1, 3, 5, 7 and 9 of the instant case):

> "It shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

Subsection (f) of said sec. 2554 provides:

> "The Secretary [of the Treasury] shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to *collectors* [*of internal revenue*] for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any of such forms to any persons other than a person who has registered and paid the special tax as required by said sections in his district." * * * (italics supplied)

Title 26 U. S. C. sec. 2553 (a) (part of the Harrison Anti-Narcotic Act, relating to count eleven (11) of the instant case):

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.'"

Title 26, U. S. C. sec. 2557 (b) provides, for the violation of the aforesaid secs. 2554 (a) and 2553 (a), a penalty, on conviction, of a fine of not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

Title 21 U. S. C. sec. 174 (part of the Narcotic Drugs Import and Export Act, commonly known as the Jones-Miller Act, relating to counts 2, 4, 6, 8, 10 and 12 of the instant case):

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 5, sec. 281c, U. S. Code, 1940 provides:

> "Sec. 281 c. Transfer of control of narcotic drugs to Secretary of Treasury.
>
> "The rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any laws in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of narcotic drugs are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury. (Mar. 3, 1927, ch. 348, sec. 4 (a), 44 Stat. 1382.)"

Title 26 U. S. C., sec. 2606, relating to the delegation of powers and duties of the Secretary of the Treasury, applicable to counts 1, 3, 5, 7, 9 and 11 of the indictment in the instant case:

> "The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs conferred upon him by subchapters A and B of this chapter and part V of subchapter A of chapter 27 upon the Commissioner of Narcotics, or any officer or employe of the Bureau of Narcotics, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges and powers, and duties which in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

By act of Congress, approved June 14, 1930 (46 Stat. 585) there was created in the Department of the Treasury a Bureau known as the Bureau of Narcotics an office of Commissioner of Narcotics.

On July 1, 1930, by T. D. No. 2, the Secretary of the Treasury promulgated an order prescribing the duties and powers of the Commissioner of Narcotics and other officers and employes of the aforesaid Bureau of Nar-

cotics, pursuant to the authority contained in the aforesaid act of Congress approved June 14, 1930 (46 Stat. 585) as follows:

"III. Rights, privileges, powers and duties conferred and imposed upon the Commissioner of Narcotics.

"(1) There are hereby conferred and imposed upon the Commissioner of Narcotics, subject to the general supervision and direction of the Secretary of the Treasury, all the rights, privileges, powers, and duties conferred or imposed upon the Commissioner of Internal Revenue (and which are transferred to and conferred and imposed upon the Secretary of the Treasury by subdivision [a] of section 4 of the act of March 3, 1927) by the act of December 17, 1914, as amended, known as the Harrison Narcotic Law, or by the act entitled, 'An Act regulating the manufacture of smoking opium within the United States and for other purposes,' approved January 17, 1914, in so far as such rights, privileges, powers, and duties relate to—

"(a) The investigation and the detection and punishment of violations of either of the above laws or any regulations issued thereunder; * * *

"(d) *The prescribing of forms and order forms under any of the above acts;*

* * * * * * *

"(2) Power is hereby conferred upon the Commissioner of Narcotics to prescribe such regulations as he may deem necessary for the execution of the functions imposed upon him or upon the officers of employees of the Bureau of Narcotics, but all regulations and changes in regulations shall be subject to the approval of the Secretary of the Treasury. * * *"

(Italics supplied.)

Pursuant to the foregoing authorization the Secretary of the Treasury issued the following Treasury Decision

4884, which retained in force Treasury Decision No. 2 of July 1, 1930, *supra*, directing the Commissioner of Narcotics to prescribe the order forms required under the Harrison Act and to issue same to the Collectors of Internal Revenue.

(T. D. 4884)

Prescribing regulations under the internal-revenue Code

TREASURY DEPARTMENT, *February 11, 1939.*

To Collectors of Internal Revenue and Others Concerned:

All regulations (including all Treasury decisions), prescribed by, or under authority duly delegated by, the Secretary of the Treasury, applicable under any provision of law on the date of the enactment of the internal-revenue code, to the extent such provision of law is superseded by the code, are hereby prescribed under, and made applicable to, the provisions of the code corresponding to the provisions of law so superseded, insofar as any such regulation is not inconsistent with the code.

These regulations are issued under authority of the provisions of sections 1928, 2559 and 2606 of the internal-revenue code and under such other provisions of the code as correspond with the several provisions of law under which any regulation or Treasury decision hereby prescribed and made applicable was issued.

H. MORGENTHAU, JR.,
Secretary of the Treasury.

[Filed with the Division of the Federal Register February 11, 1939, 1:53 p. m.]

Statement of the Case.

Petitioner was convicted (upon the testimony of one Rufus Ford, an ex-convict, with a long criminal record (Rec. 51-52) after trial by jury, in the District Court of the

United States for the District of Columbia, upon an indictment containing twelve counts. Counts 1, 3, 5, 7 and 9 (sales) and 11 (purchase) for alleged violation of the so-called Harrison Anti-Narcotic Act (26 U. S. C. A. secs. 2554(a) and 2553(a)) and counts 2, 4, 6, 8, 10 and 12 charged violation of the Narcotic Drugs Import and Export Act (commonly known as the Jones-Miller Act, 21 U. S. C. A. sec. 174).

After motion for new trial was overruled, the court imposed upon petitioner the following uncertain, ambiguous and illegal sentence:

> "whereupon it is considered by the court that for his said offense the defendant be committed to the custody of the Attorney-General or his authorized representative for imprisonment for the period of Forty (40) months to Ten (10) years and pay a fine of Five Thousand ($5,000.00) Dollars on count two; and Forty (40) months to Ten (10) years on each of counts four, six, eight, ten, and twelve, *each count to run concurrently and concurrently with count two;* and twenty (20) months to Five (5) years on count one, to take effect at expiration of sentence imposed on count two; and Twenty (20) months to Five (5) years on each of counts three, five, seven, nine, and eleven, *each count to run concurrently and concurrently with sentence imposed on count one;* and thereupon the court fixed the amount of bond on appeal in this case at Twenty-five thousand ($25,000.00) Dollars." (Rec. 11-12.)

There was a material and substantial variance between the allegation in each count of the indictment, in respect to the quantity or number of grains or heroin hydrochloride, and also in regard to the description of the drug alleged in the indictment and the substance submitted by and received in evidence in behalf of the prosecution, viz., the allegation in each count of the indictment alleges the drug to be heroin hydrochloride and the evidence produced

by the prosecution showed the substance was a mechanical mixture chiefly composed of milk sugar or cane sugar with a small quantity of heroin hydrochloride, which is quite different from heroin hydrochloride, as alleged in each count of the indictment. Its physical and therapeutical or medicinal properties are entirely different.

To make clear the ground of petitioner's objection as to the material and fatal variance between allegation in each of the twelve counts, and the testimony produced by the Government, in respect to the quantity of heroin hydrochloride alleged in each count, the record discloses the following:

Indictment alleges.		Proof produced by the Government's chemist.	
Count 1.	289 grains (Rec. 1)	4.29 grains (Rec. 39)	
Count 2.	289 grains (Rec. 2)		*
Count 3.	383 grains (Rec. 2)	2.82 grains (Rec. 48)	
Count 4.	383 grains (Rec. 2-3)		*
Count 5.	259 grains (Rec. 3)	3.84 grains (Rec. 55)	
Count 6.	259 grains (Rec. 3)		*
Count 7.	415 grains (Rec. 3)	6.15 grains (Rec. 64)	
Count 8.	415 grains (Rec. 4)		*
Count 9.	97 grains (Rec. 4)	1.44 (Rec. 78)	
Count 10.	97 grains (Rec. 4-5)		*
Count 11.	2,705 grains (Rec. 5)	40.03 (Rec. 78)	
Count 12.	2,705 grains (Rec. 5)		*
Totals	8,301 grains	58.5	

* Indicates that the theory of the Government was that the minimum quantity shown by the proof in support of the odd numbered counts was proof in support of the even numbered counts, in respect to the quantity alleged.

The foregoing variances the petitioner contended at the trial were fatal as well as prejudicial, because they were contrary to the allegations of the indictment (Rec. 40-1); objection and exception as to samples put in evidence by

the prosecution as tending to support the large quantity alleged, counts 1 & 2 (Rec. 49-50), counts 3 & 4 (Rec. 57-58); counts 5 & 6 (Rec. 65-66); counts 7 & 8 (Rec. 80-82); counts 9, 10, 11 & 12 (Rec. 79, 80, 81).

The testimony of the government chemist, in behalf of the prosecution, disclosed that of the total of 8,301 grains, alleged in the twelve counts of the indictment to be heroin hydrochloride, disclosed the same was a mechanical mixture and contained only 58.6 grains of heroin hydrochloride and the remainder was 8,242.4 grains of milk sugar or cane sugar (Rec. 79).

The court overruled petitioner's objections, severally made, as indicated above, to the introduction, by the prosecution, of the said samples, as tending to prove the allegation in each count of the indictment in respect to the large quantities and description of the alleged drug therein set forth, upon the ground of material variances between allegation and proof (Rec. 40, 41, 46-50, 57-58, 65-66, 79-80).

The point of fatal variances between allegation and proof was also raised by petitioner, at the conclusion of all the evidence in the case, by motion to direct a verdict in favor of petitioner, which was overruled, to which exception was noted by petitioner (Rec. 82). The point of fatal variances was also made by petitioner's proffered prayers Nos. 1 to 9, inclusive (Rec. 82-85), each of which was overruled, and exception taken (Rec. 83, 84, 85).

The trial court charged the jury that if they found the so-called substance sold by petitioner contained any heroin hydrochloride, and that such sale or sales were not made on the written form prescribed and issued for that purpose by the Secretary of the Treasury, then the jury would be warranted in finding petitioner guilty as charged in any one or all of the particular counts as the case may be (Rec. 93), which was to say that an infinitesimal quantity of heroin

hydrochloride found in the mechanical mixture put in evidence by the prosecution would justify a verdict of guilty,—this in direct contradiction of the large quantities of heroin hydrochloride alleged in the various counts of the indictment. The United States Court of Appeals for this District held that inasmuch as petitioner was "defrauding his illicit customers" (Rec. 104) the variance was not fatal (Rec. 104). The said appellate court also held that the variance was not a substantial one (Rec. 105).

The trial court charged the jury that the authority to issue the order forms was vested in the Secretary of the Treasury (Rec. 93), but the Court of Appeals held that "while it appears that the power to prescribe order forms has been delegated to the Commissioner of Narcotics, we are satisfied that the power to issue such forms is vested in the Commissioner of Internal Revenue. Therefore, the charge in the indictment was proper" (Rec. 104 et seq.). This ruling is contrary to Title 26, U. S. C., sec. 2554 (f), and sec. 2606, and Treasury Decisions No. 2, of July 1, 1930, and No. 4884, dated February 11, 1939, which delegated the power to prescribe such forms to the Commissioner of Narcotics, and to be distributed to and issued by the Collectors of Internal Revenue.

Petitioner moved the trial court to withdraw a juror and declare a mistrial (Rec. 47) on the ground of the misbehavior of two government witnesses, namely, Narcotic Agents Trigstead and Fields, when said Trigstead admitted on the witness stand that during the noon recess of the court he and said Fields had discussed the testimony previously testified to by said Fields as to who in the office of the narcotic division (wherein government exhibits in this case were kept) had access to the safe in said office, which resulted in a change in the testimony on the part of the witness Trigstead (who testified after said discussion

between him and said Fields), despite the fact that the court had, prior to the beginning of the trial, laid all witnesses under the usual rule (Rec. 28) and ordered the witnesses not to discuss the facts of the case with any one, or among themselves, during the recess of court, while the case was on trial (Rec. 46, 47).

The foregoing point is of general importance in the trial of cases in the federal courts of the United States, and counsel for the petitioner understands that the practice varies in the federal courts. A uniform rule in regard thereto should be laid down by this Court, that is to say, whenever the trial judge places all witnesses under the usual rule, prior to the beginning of the trial, to remain out of the court room until called to testify in court, and also not to discuss the facts of a case on trial with other witnesses, during recess of the court, if a witness disobeys such instructions of the court and discusses the facts of the case with another witness (who has already testified in court), what should be the practice and procedure? Was Petitioner's motion for a mistrial proper?

The foregoing point was briefed and presented to the Court of Appeals of this District, but the opinion of the court failed to refer specifically thereto, that Court merely stating, in its opinion, that "the other grounds" urged by petitioner for a reversal were "without merit." This included that point. But in the petitioner's petition for rehearing in the lower appellate court the point was again specifically called to the attention of that court but the petition was denied, without opinion (Rec. 114). The misbehavior of the two government witnesses in discussing their testimony, during the recess of the court, in violation of the court's order, should have resulted in ordering a mistrial at petitioner's request. Exception was taken to the court's ruling overruling said motion (Rec. 46-7).

The evidence of the prosecution disclosed that the samples had been delivered by the narcotic agents (government witnesses) to one R. S. Keefer, a clerk in the office of the chemist, and he was not produced at the trial as a witness (Rec. 82).

Because petitioner raised the question during the trial of the failure of proof of continuity of custody of the samples put in evidence by the prosecution (Rec. 87, 98), petitioner's constitutional rights under the Fourth and Fifth Amendments to the Federal Constitution were violated to his injury and prejudice by the reversible error committed in admitting in evidence, over objection and exception of petitioner (Rec. 80-81) Gov. Ex. 8 (which consisted of a cardboard box containing 8 small envelopes in each of which was a white powdered substance—a mechanical mixture, 2705 grains, of which 40.03 grains were heroin hydrochloride and the rest was milk sugar, being numbered, respectively, 8a to 8h, inclusive, placed in a large envelope, Gov. Ex. 12) to supply proof of counts 11 and 12 of the indictment, *said exhibits having been found on a shed on premises adjoining defendant's home, and which were seized by narcotic agents when they unlawfully entered defendant's home and yard, without a search warrant, or any warrant of arrest, when the defendant was taken into custody, no proof having been offered by the Government tending to show that said exhibits were the property of defendant, said transaction being an unlawful search and seizure* (Rec. 81).

The judgment imposing sentence upon petitioner (Rec. 11-12) upon each count of the indictment, is, upon its face, void, for uncertainty and ambiguity, as will be hereinafter particularly pointed out.

Reasons for Granting the Petition.

Petitioner respectfully submits that the foregoing questions, presented by the Record, are of exceptional and far

reaching general importance and to secure uniformity of decision are such as to justify a review by this Court—this for the following reasons:

I.

There was a material and fatal variance between the allegation in each count of the indictment and the evidence or proof submitted by and received in behalf of the prosecution, over objections and exceptions of petitioner, in regard to:

(a) The quantity or number of grains of heroin hydrochloride, when the exact number of such substance was definitely known by the government chemist, Dr. Speer (who testified at the trial), before and at the time this case was presented to the grand jury, which returned the indictment against petitioner.

(b) The description of the drug as alleged in the indictment and the substance submitted by and received in evidence in behalf of the prosecution, viz: the allegation in each count described the drug as heroin hydrochloride and the evidence produced by the prosecution showed the substance was a mechanical mixture consisting chiefly of milk sugar or cane sugar with a small quantity of heroin hydrochloride. Its physical and theraputical or medicinal properties are entirely different. The trial court refused to direct a verdict of acquittal, at the conclusion of all the evidence in the case, and charged the jury that the variance between the allegation and the proof was immaterial. The United States Court of Appeals for the District of Columbia affirmed the ruling, which decision of the said appellate court in the instant case, upon the foregoing question of variance in respect to prosecutions under the Harrison Anti-Narcotic Act (26 U. S. C. A. secs. 2553 (a) and 2554 (a)) and the Narcotic Drugs Import and Export Act (commonly known as Jones-Miller Act, 21 U. S. C. A. sec. 174 conflicts with *Guilbeau* v. *U. S.*, 288 Fed.

731 (CCA, 5, 1923) holding such variance fatal, which latter case conflicts with *MacIntosh* v. *U. S.*, 1 Fed. (2) 427 (CCA, 7, 1923). The opinion of the United States Court of Appeals is also in conflict with *Coleman* v. *U. S.*, 26 Fed. (2) 870 (CCA, 8, 1928) which holds that in a prosecution for unlawful sale of morphine under the Harrison Anti-Narcotic act, proof establishing the sale of sulphate hydrochloride, a derivative of morphine, was insufficient to sustain a conviction, which decision is in conflict with *MacIntosh* v. *U. S., supra,* as well as in conflict with the decision of the United States Court of Appeals for the District of Columbia in the instant case. In *Berger* v. *U. S.*, 295 U. S. 78, 80, certiorari was granted by this Court because of a conflict with other circuit courts of appeal in respect of the effect of the alleged variance between allegation and proof.

Counsel for petitioner have been unable, after due diligence, to locate a decision of any of the Circuit Courts of Appeals passing upon such question which arose in the prosecution under the Jones-Miller act.

II.

Whether in any one of the counts 1, 3, 5, 7, and 9 of the indictment a crime is stated under the Harrison Anti-Narcotic act (26 U. S. C. A., secs. 2553(a) and 2554(a)) by reason of a material, fatal variance between the allegation in each of said counts and the statute, in that the allegation in each of said counts is that the alleged sale of narcotics was made *"not in pursuance of a written order from the said Rufus Ford on a form issued in blank for that purpose by the Commissioner of Internal Revenue"* whereas the authority under the law to issue such written order is vested in the *Commissioner of Narcotics (and not in the Commissioner of Internal Revenue)* to prescribe such forms and issue the same *to the Collectors of Internal Revenue,* who, in turn, are

authorized to distribute the same and collect the tax therefor. (This point is material, *Fleisher et al.* v. *U. S.*, 302 U. S. 218).

The question lastly stated necessarily involves the proper construction of a general statute of the United States, namely, Title 26, sec. 2606, U. S. C., 1940 (53 Stat. 283, same as sec. 2606, I. R. C., 1939) which confers upon *the Commissioner of Narcotics*, or any officer or employe of the Bureau of Narcotics, the rights, privileges and duties in respect of narcotic drugs, originally conferred upon the Secretary of the Treasury by previous federal statutes (subchapter A and B of chapter 23, Title 26, 1940, and chapter 23, I. R. C. and part V of subchapter A of chapter 27, I. R. C.), *and divesting the Commissioner of Internal Revenue of all previous authority conferred upon him by the Secretary of the Treasury by reason of prior administrative regulations.*

There is also involved herein proper construction of Treasury Regulations, since pursuant to Title 26, sec. 2606, U. S. C., 1940, the Secretary of the Treasury by T. D. 4884, February 11, 1939, (retaining in force T. D. #2, of July 1, 1930) transferred all power and authority to the Commissioner of Narcotics to prescribe the required forms under the Harrison Anti-Narcotic Act (26 U. S. C. A. sec. 2553 (a) and 2554 (a)), *and to issue the same to the Collectors of Internal Revenue* for distribution and collection of the tax.

Each of the foregoing odd numbered counts of the indictment fails to state an offense by reason of the foregoing misdescription in each of said counts, and each of said counts is fatally defective in view of the authoritative decision of *Fleisher et al* v. *United States*, 302 U. S., 218 (1937), which was misconstrued and misapplied by the United States Court of Appeals for the District of Colum-

bia, which erroneously held that the *Fleisher case* "apparently conflicted" with the earlier decision of *Berger* v. *United States*, 295 United States, 78, 82 (1935), the lower appellate court asserting, in its opinion:

"We can discover no cases attempting to reconcile the apparent conflict." (Rec. 104 et seq.) (Italics supplied). There is no conflict.

The said Court of Appeals failed in the instant case to adhere to the principles of law announced in the *Fleisher case* (302 U. S. 218), as well as the *Berger case* (295 U. S. 78, 82), and because of their vital importance in the administration of criminal prosecutions under the Harrison Anti-Narcotic Act, it is submitted that the writ of certiorari should be granted.

III.

Petitioner's motion for a mistrial should have been granted, by reason of the misbehavior of the two government witnesses, who violated the order of the court not to discuss the facts involved in this case, while they, as well as all of the other witnesses, were under the usual rule of separation.

Under the facts and circumstances disclosed by the Record herein, we submit with great respect, that it is imperative that a uniform rule of practice and procedure be laid down by this Court to guide the federal District Courts, to sustain a motion by a party litigant, seasonably made, for a mistrial, in order that such litigant may have a fair and impartial trial and due process of law within the meaning of the Fifth Amendment to the Federal oCnstitution.

IV.

Whether the use of evidence by the prosecution, over objection and exception by petitioner (Rec. 80-1), obtained by

an illegal search, by narcotic agents and police officers, of petitioner's home and premises without a warrant of arrest or without a search warrant, and the seizure by them of such evidence on a shed adjacent to petitioner's home, was in violation of the Fourth Amendment to the Federal Constitution, as well as the denial of due process of law within the meaning of the Fifth Amendment to said Constitution.

V.

The sentence of the court is on its face void (1) for uncertainty and ambiguity; and (2) the same is illegal, because said sentence deprives petitioner of due process of law within the meaning of the Fifth Amendment to the Federal Constitution, and the same is in violation of the Eighth Amendment to said Constitution in that said sentence inflicts upon petitioner cruel and unusual punishment.

Wherefore, petitioner respectfully prays that the writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a transcript of the record and of all proceedings in this cause (same being entitled Clarence Cromer, appellant, vs. United States of America, appellee, No. 8536 on the docket of said Court of Appeals) to the end that the record and proceedings therein be reviewed by this Honorable Court and the judgment of said Court of Appeals be reversed, with directions to that Court to remand said cause to the District Court of the United States for the District of Columbia to set aside the judgment and sentence imposed upon petitioner and to dismiss the indictment against petitioner, or for such further proceedings not inconsistent with the opinion and judgment of this Honorable Court, and for such other and further relief

in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

CLARENCE CROMER,
Petitioner.
By LEVI H. DAVID,
Bond Building,
Washington, D. C.
M. EDWARD BUCKLEY, JR.,
406 5th Street, N. W.,
Washington, D. C.
Petitioner's Attorneys.